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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1066

CITY OF PHOENIX, ARIZONA, and MILTON GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPINION BELOW

The opinion of the lower court has not yet been officially reported. A copy of that opinion is set forth in the Appendix.

JURISDICTION

This is an appeal from the judgment of a three-judge district court invalidating the following provisions of Arizona law insofar as they restrict elections to real property taxpayers who are qualified electors:

Article 7, Section 13, Arizona Constitution

Article 9, Section 8, Arizona Constitution

Title 9, Section 523, Arizona Revised Statutes

Title 35, Section 455, Arizona Revised Statutes

This appeal is taken from the judgment of the lower court insofar as it holds the foregoing provisions unconstitutional as applied to general obligation bond authorization elections, and specifically to the bond authorization election held by the City of Phoenix on June 10, 1969. The lower court entered its judgment on December 17, 1969. The Notice of Appeal was filed on December 19, 1969. A copy of the Judgment from which the appeal is taken is set forth in full in the Appendix.

This Court has jurisdiction by virtue of 28 U.S.C. Section 1223.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Arizona Constitution, Article 7, Section 13

Submission of questions upon bond issues or special assessments

Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this State, and of the political subdivisions thereof affected by such question. As amended, election Nov. 4, 1930, eff. Dec. 1, 1930.

Arizona Constitution, Article 9, Section 8

Local debt limits; assent of taxpayers

No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding four per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors, therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for State and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and

towns assessments shall be taken from the last assessment for city or town purposes; Provided, that under no circumstances shall any county or school district become indebted to an amount exceeding ten per centum of such taxable property, as shown by the last assessment roll thereof; and Provided further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum additional, for supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers are or shall be owned and controlled by the municipality. As amended, election Nov. 5, 1912, eff. Dec. 5, 1912.

Arizona Revised Statutes, Section 9-523

Bond election

Questions on bond issues under this article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

Arizona Revised Statutes, Section 35-452

Election to authorize indebtedness; qualifications of electors

A. The governing body or board of a political subdivision enumerated in § 35-451 may, and upon petition signed by fifteen per cent of its real property taxpayers who are qualified electors thereof shall, order an election by such taxpayers and electors to determine whether such indebtedness shall be authorized.

B. The order for the election in a school district shall be made by the board of supervisors in the county where such election will be held, either upon petition or upon request of the board of school trustees.

C. If a majority of the real property taxpayers who are qualified electors voting at the election vote in favor of creating an indebtedness in an amount exceeding four per cent of the value of the

taxable property of the political subdivision, such political subdivision may become so indebted.

Arizona Revised Statutes, Section 35-454

Notice of order for election; election; return; canvass of vote; certificate of election

A. The governing body or board of the political subdivision shall:

1. Post at least five copies of the order for election in public places within the subdivision in which the election is to be held at least twelve days prior to the day of the election.

2. Post a copy of the order at each polling place therein.

3. Publish a copy thereof in a newspaper for at least thirty days prior to the day of such election.

B. The election shall conform with the general election laws of the state. The return of the election held in a county or school district shall be made to the board of supervisors, and, in any other case to the governing body or board of the municipal corporation within twelve days after the election.

C. The board of supervisors, governing body or board shall hold a special meeting on the first Monday succeeding the twelfth day after the election to canvass the votes cast and certify the result. The certificate of the result shall be prima facie evidence of full performance of all conditions and requirements precedent to holding the election.

D. The governing board or body shall file and record in the office of the county recorder a certificate disclosing the purpose of the election, the total number of votes cast and the total number of votes for and against creating the indebtedness, and stating that the indebtedness is ordered. Upon filing and recording the certificate, the governing board or body shall carry out the purpose of the election.

Arizona Revised Statutes, Section 35-455

Issuance and sale of bonds; call for election

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by § 35-454, issue and sell bonds in the amount authorized at the election.

B. The call for the election shall set forth the amount of each bond and the aggregate amount of the bonds, the rate of interest to be paid thereon not exceeding six per cent per annum, when the interest is payable, the number of years such bonds or any series thereof are to run from the date of such bonds or series and the purposes for which the money derived from the sale of the bonds will be expended. As amended Laws 1959, Ch. 51, § 1.

Arizona Revised Statutes, Section 35-458

Levy of tax for payment of interest and bonds

A. After the bonds are issued, the governing body or board shall enter upon its minutes a record of the bonds sold, their numbers and dates, and shall annually levy and cause to be collected a tax, at the same time and in the same manner as other taxes are levied and collected upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and shall likewise annually levy a tax sufficient to redeem the bonds when they mature.

B. Monies derived from the levy of the tax when collected shall constitute a fund for payment of interest and the bonds. The fund shall be kept separately and shall be known as the "Interest Fund" and "Redemption Fund."

QUESTIONS PRESENTED

1. Last term, in *Cipriano v. City of Houma,* 395 U.S. 701

(1969), this Court invalidated a Louisiana revenue bond election on the ground that only property taxpayers were allowed to vote. Presented for decision in the instant case is whether the holding in *Cipriano* applies to general obligation bonds, which, unlike revenue bonds, pledge the general ad valorem taxing power of the issuing body toward repayment of the bonds, and constitute an effective lien upon all taxable realty within the taxing district.

2. Assuming, *arguendo* that the decision of the lower court is to be affirmed, whether the holding should be prospective only from the date of this Court's decision.

STATEMENT OF THE CASE

On June 10, 1969, the City of Phoenix, Arizona, submitted to the persons who under Arizona law are qualified to vote in bond authorization elections, ten separate proposed bonding issues. The first two of these propositions were for revenue bonds, $53,900,000 for the municipal water system, and $58,900,000 for the municipal airport and related facilities. The other eight proposed issues were general obligation bonds. The purposes and amounts of the general obligation bonds were as follows: Sewer system, $37,000,000; parks and playgrounds, $9,000,000; municipal buildings, $1,000,000; fire department, $1,200,000; police and public safety buildings, $4,500,000; maintenance and service facilities, $1,500,000; sanitary land fills, $2,250,000; library, $4,000,000.

The constitutional and statutory provisions applicable to all bond authorization elections of incorporated cities and towns in the State of Arizona limit the right to vote in such elections to persons who are qualified electors and who are also real property taxpayers. Arizona Constitution, Article 7, Section 13; Article 9, Section 8. Arizona Revised Statutes, Section 9-523 and Section 35-455. These constitutional and statutory provisions apply to all

political subdivisions within the State of Arizona, and not just to cities and towns.

The plaintiff in this case, Emily Kolodziejski, is a resident of the City of Phoenix and a qualified elector, but was not a real property taxpayer on June 10, 1969. Accordingly, she did not vote in the bond election held on that date.

All of the propositions submitted to the electorate on June 10, 1969, were approved by a majority of the persons voting in that election.

The decision of this Court in *Cipriano v. City of Houma,* 395 U.S. 701 (1969), was handed down on June 16, 1969, six days after the City of Phoenix bond election. One week later, on June 23, 1969, the City Council canvassed the result of the election pursuant to A.R.S. § 35-454 C, and certified that each issue had carried.

The appellee filed this action seeking a determination that all provisions of the Constitution and statutes of the State of Arizona which require the ownership of property and the payment of taxes thereon as a condition of voting in bond authorization elections are in violation of the United States Constitution. The appellee therefore contended that the bond election held on June 10, 1969 was null and void, and sought injunctive relief against the issuance of any bonds authorized at that election.

The case was argued on the merits before a three-judge district court on a stipulated statement of facts. The lower court filed its per curiam opinion and order on November 25, 1969. On December 17, 1969 the court entered its formal written judgment from which this appeal is taken.

SUMMARY OF ARGUMENT

Last term, in *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969), this Court held that the State of New York could not constitutionally limit the vote in school board elections

to persons who owned or leased real property, or were parents or guardians of school age children without establishing a "compelling state interest" for such limitation. *Kramer* further held that there was no compelling state interest which would justify the limitation in that case.

On the same day, in *Cipriano v. City of Houma,* 395 U.S. 701 (1969), this Court invalidated a Louisiana city revenue bond election on the ground that only property taxpayers were allowed to vote in the election.

Neither by their express language nor by necessary implication have the *Kramer* and *Cipriano* decisions overruled the general principle, laid down by this Court in a wealth of decisions, prescribing that "the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . ." *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 50 (1959) and that a legislative classification is constitutionally infirm only "if it rest[s] on grounds wholly irrelevant to achievement of the regulation's objectives." *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552, 556 (1947).

Because of its basic inconsistency with the general principles laid down by this Court in numerous decisions involving the powers of the states to prescribe voter qualifications, the compelling state interest test should be confined to *Kramer's* factual context. In *Kramer* this Court wisely refrained from overruling its prior decisions, and should not now do so. Absent the *Kramer* facts, therefore, the traditional principles should govern, and state voting requirements which reasonably relate to a proper state objective should be upheld.

Even if the compelling state interest test is determined to extend beyond the *Kramer* factual situation, the underlying reasoning of the *Kramer* opinion does not interdict a state scheme which limits

the vote in general obligation bond elections to real property taxpayers. The rationale set forth in *Kramer* is that traditional equal protection doctrine, permitting classifications which are reasonable and not arbitrary nor discriminatory, assumes "that the institutions of state government are structured so as to represent fairly all the people," 395 U.S. at 628, and that such a liberal test can not be permitted when the constitutional challenge is to legislation "which delegates decision making to bodies elected by only a portion of those eligible to vote. . . ." *Ibid.* It follows, *Kramer* reasoned, that "the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials." *Id* at 627.

Bond elections do not involve the "election of legislators and other public officials." Thus, the theoretical prerequisite for the more restrictive "compelling state interest" test articulated in *Kramer* is absent in bond elections. Therefore, whether the compelling state interest test is confined to the context in which *Kramer* arose, or whether it is given broader reach, it has no applicability whatever to general obligation bond elections.

Applying traditional equal protection principles to this case, there is a reasonable basis upon which states may limit the franchise in general obligation bond elections to those persons whose property is to be taxed for the purpose of repaying the bonds.

In the event that the decision of the lower court is to be affirmed, it is respectfully submitted that the decision should not be given retroactive effect. The issue of *Cipriano's* applicability to general obligation bonds was specifically left open by the *Cipriano* opinion. The same reasons for which the Court in *Cipriano* held that decision prospective only apply with equal force to general obligation bonds. Because of the potentially disruptive effect which a retroactive holding in this case might have upon municipal financing which has already occurred, any application

of *Cipriano* to general obligation bonds should apply only to bond authorization elections held after the date of this Court's decision in this case, or in those states whose statutes provide bond election challenge periods, after the statutory time for challenge has expired.

ARGUMENT

I.

Over a period of many years this Court has laid down the fundamental principles governing the right of the states to prescribe reasonable conditions under which citizens will be allowed to vote. In a unanimous opinion authored for the Court by Mr. Justice Douglas, in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959), the relevant decisions of this Court were summarized as follows:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams,* 193 U.S. 621, 633; *Mason v. State of Missouri,* 179 U.S. 328, 335, absent of course the discrimination which the Constitution condemns." 360 U.S. at 50.

Involved in *Lassiter* was a challenge to North Carolina's literacy test. Obviously, there are some illiterates who are more intelligent, more interested in civic affairs, and generally better citizens and more able voters than many persons who can read and write. Nevertheless, literacy as a state-imposed condition for voting was upheld by *Lassiter* because such a requirement falls within the "wide scope for exercise of [state] jurisdiction" in these matters. 360 U.S. at 51.

Beyond all dispute, every state voting qualification works an unfairness on some individual when compared with some other individual. There are many persons whose twenty-first birthday occurs the day after election day, or who have not been residents of the state the required period of time, or who are illiterate or have a previous criminal record, who are nevertheless more in-

terested citizens and would make more intelligent voters than other persons to whom these limitations do not apply. Many of the resulting inequities are more important to the individual citizen — and have a more potent impact upon the total complex of his governmental interests — than property ownership as a prerequisite to voting in a general obligation bond election. For example, it is unquestionably more important to a resident of the City of Phoenix to vote in November for the City Council — which has power over the entire panoply of city policy matters, including the initial decision to request a bond authorization election — than to vote in a city bond election the following May. But if his twenty-first birthday falls in December, he cannot vote in November, notwithstanding the fact that he is more interested, informed, and conscientious than many who are over twenty-one years of age.

Inevitably, if the state is to prescribe voter qualifications, such individual inequities will result. In doubtless recognition of this fact, this Court has applied the same test to voter qualification requirements that it has applied generally to state schemes brought into question on equal protection grounds: those classifications which are reasonable, and which are not arbitrary, invidious, or discriminatory, are upheld. In general, requirements that voters be a certain age, residents of the state for a certain time, and able to pass a literacy test are reasonable, and do not violate the Fourteenth Amendment's equal protection guaranty. The same is true of property ownership qualifications to vote in general obligation bond elections. There may be individual inequities, but in general, there is a reasonable basis for the classification: one step in the overall determination to issue bonds is reserved to those persons whose property is to be taxed to repay the bonds, and is encumbered by the bonds.

The only exceptions to the otherwise unanimous voice of authority emanating from some 100 years of this Court's decisions

in the area of state qualifications for exercise of the franchise are the decisioins last term in *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969) and *Cipriano v. City of Houma,* 395 U.S. 701 (1969). We do not read *Kramer* and *Cipriano* to have affected a general repeal of the entire body of law represented by *Lassiter v. Northampton County Board of Elections,* 360 U. S. 45 (1959); *Pope v. Williams,* 193 U.S. 621 (1904); *Mason v. State of Missouri,* 179 U.S. 328 (1900); *United States v. Reese,* 92 U.S. 214 (1876) and others. Those cases, and the principle for which they stand, were neither expressly nor by necessary implication overruled or rejected by *Kramer* or *Cipriano.* Since the general principle was not rejected, the logical conclusion is that it remains intact except for the particular factual contexts in which *Kramer* and *Cipriano* arose.

General application of the "compelling state interest" test all across the spectrum of state voter qualifications would raise inordinate problems. One of the regrettable chapters of this Court's history is reflected in a series of decisions in which the Court attempted to apply what Mr. Justice Black has referred to as a "natural-law-due-process formula." (See Mr. Justice Black's dissent in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670, 675 (1966). During that period this Court effectively substituted its own judgment for that of the various state legislatures; it did so under the guise of constitutional interpretation. In the sphere of economic regulation, this approach to constitutional adjudication has, happily, been supplanted by an approach which permits the states to enact regulatory programs which are reasonably related to proper state objectives. *Nebbia v. New York,* 291 U.S. 502 (1934).

Extension of the compelling state interest test generally, to matters of state-imposed voter qualifications would effectively reintroduce that "natural-law-due-process formula." The oft-

quoted language of Mr. Justice Holmes dissenting in *Lochner v. New York*, 198 U.S. 45, 75, (1905) that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" has its counterpart in the present context. By limiting the range of state electives to those instances where the state has a "compelling state interest," the choices which a state may constitutionally make are so limited that the courts have effectively placed themselves in a position to substitute their own judgment for that of the legislature. The instant case provides an excellent example: who could say with confidence that it is any more irrational to prohibit an illiterate, but well informed person from voting for President of the United States — or a twenty-year-old from voting for the executive, legislative and judicial officers of his State — than to prohibit non property owners from voting on bonds which will be repaid from property taxes. These are the kinds of policy choices that legislatures are best qualified to make and that should be left to legislatures.

No one really knows what "compelling state interest" means in the present context, but under almost any view, if it proscribes property qualifications for voting in general obligation bond elections, it must also interdict such qualifications as age, residence, literacy, etc., as voting qualifications generally. Very simply, there is no *compelling* reason why a state should exclude all twenty-year-olds from voting. Or all nineteen-year-olds. Or all eighteen-year-olds. Or all illiterates or all short time residents. Nevertheless, these exclusions are reasonable, when applied to the populace as a whole. The only workable test by which the constitutionality of such decisions can be judged is the time-honored one, whether the choice is rational, and not arbitrary, invidious, or discriminatory. As Mr. Justice Black pointed out in dissent in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670, 673-674:

"A study of our cases shows that this Court has refused to use the general language of the Equal Protection Clause as though

it provided a handy instrument to strike down state laws which the Court feels are based on bad governmental policy. The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not "irrational," "irrelevant," "unreasonable, " "arbitrary," or "invidious." These vague and indefinite terms do not, of course, provide a precise formula or an automatic mechanism for deciding cases arising under the Equal Protection Clause. The restrictive connotations of these terms, however (which in other contexts have been used to expand the Court's power inordinately, see, e.g., cases cited in Ferguson v. Skrupa, 372 U.S. 726, at pp. 728-732) are a plain recognition of the fact that under a proper interpretation of the Equal Protection Clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act."

There is no constitutional difference between the bond election at issue in the instant case and any other general obligation bond election. The parties have stipulated that "The source of funds for the 1969-70 fiscal year shows $2,350,200 of the annual general obligation debt service requirements of $5,594,973 to be paid through levy of ad valorem property taxes, the remaining $3,244,733 to be paid from other sources." Stipulated Statement of Facts, No. X, Appendix 15. The fact that during one year the City of Phoenix had available sufficient excise tax revenues and elected to use part of those revenues for the purpose of retiring some of its bond obligations is without constitutional significance. The fact remains that the security for the City's general obligation bonds is the City's pledge that it will use its ad valorem property taxing power to repay the bonds. Thus, the effective lien which the bonds represent against all real property within the City is unaffected by the fact that part of the obligation in some years may be repaid through excise taxes. The only tax which the City is obligated to impose by reason of the bonds is a property tax. Use of

excise tax revenue is optional.[1] Moreover, even during the year covered by the stipulation, a very substantial portion of the general obligation debt service requirements was met through property taxes.

The parties have further stipulated that "Plaintiff does not pay real property taxes as aforesaid, however, the amount of money paid as real property taxes is a cost of doing business of the plaintiff's landlord and as such has a material bearing on the cost of the plaintiff's rental payments." Stipulated Statement of Facts, No. VI, Appendix, 14.

The fact that the plaintiff's landlord's real property taxes have "a material bearing on the cost of the plaintiff's rental payments" does not place the plaintiff — as a matter of constitutional equal protection requirement — in the same category with property owners who actually pay the taxes and whose property is subject to the lien of the bonds.

In the first place, the stipulation is that in the case of this one plaintiff, property taxes have "a material bearing." There is no stipulation and there is no evidence on the record that in all cases or even in the majority of cases, real property taxes are passed on to lessees. Neither is there any evidence concerning the extent to which they are passed on. The most that can be said is that

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[1] A.R.S. §35-458 provides in pertinent part that "after the bonds are issued, the governing body or board . . . shall annually levy and cause to be collected a tax . . . upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and . . . to redeem the bonds when they mature." *Allison v. City of Phoenix*, 44 Ariz. 66, 33 P.2d 927 (1934) held that if a city has money available from another source "it may from time to time be transferred to the interest and redemption funds created by the statute . . . ." 44 Ariz. at 77. The Arizona Supreme Court in *Allison* clarified, however, that the predecessor of A.R.S. §35-458 "is mandatory and binding upon all parties mentioned therein, and that they must levy and cause to be collected a tax for the payment of bonds issued under such article, in the manner provided by such section." *Id.* at 74. Therefore, use of excise taxes to repay general obligation bonds is optional; imposition of ad valorem taxes for these purposes is mandatory.

there may be individual instances, such as in the case of Miss Kolodziejski, in which property taxes have "a material bearing" on rental payments.

Assuming *arguendo* that in a majority of cases within the City of Phoenix — as has been stipulated with regard to Miss Kolodziejski — the landlords' real property taxes have " a material bearing on the cost of the [lessees'] rental payments," the source of funds for paying any given year's property taxes is not the sole factor — or even the most important — which must be taken into consideration. The obligation to make rental payments is a less permanent and more revocable financial commitment than ownership of real property. The impact of general obligation bonds in the usual case is a long range commitment[2] and the lien resulting from these bonds is of similar permanence. A.R.S. § 35-458 provides that a tax *shall* be levied annually sufficient "to pay the interest on the bonds when due" and to "redeem the bonds when they mature." Thus, the bonds become a lien upon all taxable property within the issuing municipality, because all property taxes constitute a lien on the property. A.R.S. § 42-312. This is a lien which remains with the property for the life of the bonds. If the owner of the property attempts to sell the property he must sell it subject to this lien. The lien, therefore, attaches to the property and necessarily affects the value of the owner's interest in the property. General obligation bonds have no corresponding impact upon the interest of lessees. Lessees may come and go, but the lien of the bonds remains a burden on the property throughout the life of the bonds — in the instant case, 21 years from the date of issuance of each series.

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[2] In the election here at issue, for example, each of the general obligation bond propositions approved by the voters provided that the term of each series of bonds was to be twenty-one years. These bond propositions are contained in the City Ordinance ordering the election, Ordinance No. S-4747, a copy of which is included in the original record on appeal in this case.

Both from a legal and also a practical standpoint, the status of the real property taxpayer in a general obligation bond election is analogous to that of a person who encumbers his property as security for a loan. Assume, for example, that A and B become joint obligors on a promissory note, which is secured by a mortgage on property belonging only to A. A and B do not have the same interest in seeing that the loan is repaid. Both are personally liable, but only A's property is encumbered by the debt. In general, secured obligations can be obtained on terms more favorable to the borrower than unsecured obligations. Also, other things being equal, general obligation bonds can be marketed on terms more favorable to the issuing entity than revenue bonds.

Similary, assume that A and B are residents of the City of Phoenix, each with approximately the same amount of money to invest. A elects to live in rented quarters, and to invest all of his money in common stocks (or municipal bonds). B, on the other hand, invests his money in a home, or in investment real estate. So long as A remains a resident of the City of Phoenix he may or may not participate in the annual bond payments. Under any circumstances, however, he can completely free himself from all effect of the bonds by simply moving to the neighboring City of Scottsdale. Not so with B. For the life of the bonds his investment is encumbered by the lien of the bonds, whether he personally continues to live in the City of Phoenix or elsewhere. He may sell his real estate investment, but even then, the bond lien will affect the sales price.

If the City of Phoenix becomes indebted by reason of the issuance of general obligation bonds, all citizens may be affected to one degree or another by the bonded indebtedness. But the collateral security for the loan has been supplied only by the property taxpayers. Other citizens may live here for a time and then leave, taking their worldly wealth with them and leaving the bond obligations behind, but the real property which provides

the security for the bonds remains encumbered by the general obligation bonds so long as the bonds are unpaid. It is the long term lien on real property which places the owner of that property in a separate category from non-property owners.

Even more important, affirming the lower court on the basis that Miss Kolodziejski and presumably some but not all other renters in the City of Phoenix effectively participate in some portion of the annual bond payments, would propel this Court once again into the *Lochner v. New York* quagmire from which it had been assumed the Court extricated itself in *Nebbia v. New York*. As this Court pointed out in *Kramer*, there are persons such as Mr. Kramer who neither own nor lease property, but live with their parents, or other relatives, or whose property is for some reason exempt from taxation.[3] Attempting to identify which of these people the State may constitutionally subject to voter qualification requirements in general obligation bond elections and which of them it may not, and attempting further to lay down rules distinguishing among these various groups, involves the kind of line-drawing and decision-making that properly lies within the legislative, and not the judicial sphere. Certainly it lies within the power of the people of the State of Arizona in adopting a State Constitution, and within the power of their elected state representatives in enacting statutes, to conclude that there is a rational distinction between — on the one hand — persons who actually pay the tax and whose property is subject to the long-term lien of the bonds and — on the other hand — those who merely pay rent.

It is therefore submitted that no constitutional significance should attach to the fact that in Miss Kolodziejski's case there is a relationship of unspecified magnitude between property taxes

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[3] Arizona law provides, for example, that within certain limits property of widows and veterans is exempt from property taxation. Arizona State Constitution Article 9, section 2; A.R.S. §42-271 8.

and rental payments. As with all voter qualifications, it is possible to point to instances in which the scheme may work an inequity if certain individuals are compared with certain other individuals.[4] But the limitation in this case, taken as a whole, is reasonable. Considering the entire spectrum of voters and their interests in subjecting the City to long term debts to be repaid from property tax revenues over an extended term of years, it is reasonable to restrict the vote in general obligation bond elections to those whose property will be encumbered by the bonds and taxed to repay them.

II.

Even if the compelling state interest test is not limited to the *Kramer* factual context it should have no applicability to bond elections. Assuming the test set forth by *Kramer* to reach all elections within its potential scope, bond elections are nevertheless outside the ambit of the *Kramer* rationale.

The majority opinion in *Kramer* recognized that the compelling state interest test involved departure not only from traditional equal protection doctrine generally, but also from traditional equal protection doctrine applied in the voter qualification context. The reasons for this departure were set forth by the *Kramer* opinion:

> [T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the

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[4] As Mr. Justice Stewart correctly observed in his dissent in *Kramer v. Union Free School District:*

> "But such discrepancies are the inevitable commitant of the line-drawing that is essential to law-making. So long as the classification is rationally related to a permissible legislative end, therefore — as are residence, literacy, and age requirements imposed with respect to voting — there is no denial of equal protection." 395 U.S. at 637.

right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. 395 U.S. at 627-628.

The *Kramer* rule, therefore — and the reasoning underlying the adoption of that rule — have no applicability whatever to elections which do not involve "the election of legislators and other public officials."

The majority in *Kramer* reasoned that in identifying those persons who are to be entitled to select officials who govern and make policy, states were not to be given the latitude which they are otherwise permitted because the underlying assumption for such latitude is "an assumption that the institutions of state government are structured so as to represent all of the people." 395 U.S. at 628. Bond elections have nothing to do with the structuring of the institutions of government so as to represent all of the people, or with "election of legislators and other public officials." *Id.* at 627. Elections related to the structure of state governmental institutions are elections of people, such as the election in *Kramer*. The reason for the *Kramer* departure from traditional equal protection principles being totally non-existent in the bond election context, the *Kramer* holding is inapplicable to bond elections. Bond elections are governed, therefore, by the general rule, rather than the exception, and qualifications to vote in bond authorization elections should be upheld if reasonable.

Inapplicability of the *Kramer* rule to general obligation bond

elections is further borne out by the fact that such an election constitutes only one part of a three-part proceeding in the issuance and sale of municipal bonds. The first of these three steps is a determination by the governing body of the municipality that certain municipal improvements are needed, and that authority should be sought to issue bonds to finance these improvements. The second step is the election. The final determination as to whether the municipality is to become indebted, however, lies once again with the city council or other governing body, which must determine at which time the bonds are to be sold, if at all, and the rate of interest which they will bear. Therefore, both the initial decision and the final decision concerning the issuance of bonds are vested in the governing board of the municipality, elected by all qualified electors. In an analogous context involving voting rights, this Court has recognized and approved similar distributions of voting power among interested groups. In approving the Virginia Beach "Seven-Four Plan" in *Dusch v. Davis,* 387 U.S. 112, 117 (1967), for example, this Court stated as follows:

> The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside. Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is reversed.

Unless a century of consistent decisions by this Court are to be completely rejected — and they were not by *Kramer* and *Cipriano* — there is nothing unconstitutional about a system which vests both the initial decision to request authorization for municipal improvement projects, and also the final decision to issue bonds for these purposes, in a general governing body elected by both property owners and non property owners, while reserving the power to authorize the bonds in those persons whose property will be taxed in order to repay the bonded indebtedness.

The three step procedure involved in approving and issuing general obligation bonds — only the second of which is restricted to participation by property taxpayers — "reflects a detente between [property owner and non property owner] that may be important in resolving the complex problems of [municipal financing]," a detente similar to that which this Court in *Dusch v. Davis* held to be free from constitutional infirmity.

The rationale underlying the *Kramer* decision rests solely upon the inability of non-property taxpayers to elect the governing, policy-making body of the municipality involved — in *Kramer,* the school board; in the instant case, the city council. Since the theoretical underpinning of *Kramer* is necessarily absent in bond elections, the compelling state interest test, whatever its scope otherwise, is simply inapplicable to bond elections.

We recognize that passing references were made to "compelling state interest" in *Cipriano.* However, the references are bare dictum not essential to the decision, since, as the dissent by Mr. Justice Black and Mr. Justice Stewart observes, the voter qualification there involved was "wholly irrelevant to achievement of the state's objectives." 395 U.S. at 701.

The reasoning of the *Cipriano* opinion itself impels the conclusion that its holding should not apply to general obligation bonds. The opinion recognizes and assumes *arguendo* "that a state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election . . . ." 395 U.S. at 704.

If the "specially interested" limitation includes anything at all, it must include property taxpayers in a general obligation bond election.

The two principal prototypes of municipal financing obligations are revenue bonds, such as were involved in *Cipriano v. City of Houma,* and general obligation bonds, such as are at issue in

this case. The *sine qua non* of general obligation bonds — and the single characteristic which distinguishes them from other bonds — is that the municipality which issues such bonds pledges its general ad valorem taxing power toward their repayment. Revenue bonds may be repaid either from the revenues derived from the assets financed by the bonds — such as the electric facilities in *Cipriano* — or from some other source, so long as the general ad valorem taxing power of the issuing municipality is not pledged toward repayment. It is generally true that, other things being equal, general obligation bonds can be marketed on terms more favorable to the issuing entity than non general obligation bonds.

General obligation bonds, therefore, unlike revenue bonds effectively place a lien for the life of the bonds on all taxable property located within the confines of the issuing municipality. Arizona Revised Statutes, Section 35-458 provides as follows:

"Levy of tax for payment of interest and bonds

A. After the bonds are issued, the governing body or board shall enter upon its minutes a record of the bonds sold, their numbers and dates, and shall annually levy and cause to be collected a tax, at the same time and in the same manner as other taxes are levied and collected upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and shall likewise annually levy a tax sufficient to redeem the bonds when they mature.

B. Monies derived from the levy of the tax when collected shall constitute a fund for payment of interest and the bonds. The fund shall be kept separately and shall be known as the 'Interest Fund' and 'Redemption Fund.' "

Taxes imposed on real property in Arizona become a lien on that property. A.R.S. § 42-312.

Thus, during the entire life of the bonds; the realty of the real property taxpayer is irrevocably burdened by the pledge — and the statutory obligation — of the municipality to utilize its taxing

power for the purpose of repaying the bond obligation. In *Baker, Watts & Co. v. Saxon,* 261 F. Supp. 247, 252 (D.D.C. 1966) the United States District Court for the District of Columbia observed as follows:

> "While there is a paucity of judicial authorities on the subject, it was held by the Supreme Court of Oregon, in City of Eugene v. Willamette Valley Co., 52 Or. 490, 97 P. 817, 821, that the phrase 'general obligations' means, 'a municipal debt, for the payment of which provision must be made by devoting funds raised by taxation, thereby appropriating in discharge thereof a pro rata share of the burden upon all property in a specified district that is subject thereto.' No authorities have been cited to the contrary."

At the very least, this much is clear: If a "specially interested" limitation is to be recognized — as indeed it should — the dividing line must be drawn between those instances in which the municipality pledges its property taxing power and those in which it does not.[5] If the "specially interested" limitation referred to by the *Cipriano* opinion means anything at all, it must include real property taxpayers in a general obligation bond election. There is no more clear example of voters being specially interested in the outcome of a bond election than voters whose property is encumbered by the bonds and constitutes the source of funds for their repayment.[6]

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[5] The effect of general obligation bonds on personal property is nominal by comparison to their impact on real property. There is no personal property tax applicable to household goods in Arizona. A constitutional amendment adopted by Arizona voters in the 1968 general election provides that "all household goods owned by the user thereof and used solely for non-commercial purposes shall be exempt from taxation . . . ." Constitution Article 9, Section 2. Personalty used for commercial purposes is subject to ad valorem taxation, but because of the exemption for household personalty, the personal property tax in Arizona occupies a very minor role in the overall ad valorem taxation scheme; it has no effect on the great majority of Arizona citizens.

[6] In other contexts this Court has recognized that the interest of taxpayers in public matters related to the expenditure of tax moneys may sufficiently outweigh the interest of the general citizenry to entitle such taxpayers to status which non taxpaying citizens do not enjoy. See *Flast v. Cohen,* 392 U.S. 83 (1968).

That the "specially interested" exception anticipated a distinction between general obligation bonds and revenue bonds is further strengthened by the following language in the *Cipriano* opinion:

> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." 395 U.S. at 705.

III.

For the foregoing reasons, it is respectfully submitted that *Kramer* should be limited to the factual context in which it arose. In any event, however — regardless of *Kramer's* scope otherwise — the compelling state interest test should not apply to municipal bond elections. Since limiting the franchise in general obligation bond elections to those persons whose property will be taxed in order to repay bond obligations is reasonable, the holding of the lower court should be reversed, and the general obligation bonds approved by the voters of the City of Phoenix at the election held on June 10, 1969 should be held free from constitutional defect.

In the event that the decision of the lower court should be affirmed, however, the decision should be given prospective effect only from the date of this Court's decision.

The reasons indicating a prospective application of any extension of the *Kramer* and *Cipriano* holdings to general obligation bond elections are the same as those which the Court set forth in *Cipriano* itself:

> Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of

this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardships" by a holding of nonretroactivity. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). See *Chicot County Drainage Dist. v Baxter State Bank*, 308 U.S. 371 (1940). Cf. *Linkletter v. Walker*, 381 U.S. 618 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization. 395 U.S. at 706.

As reflected by several of the amici briefs which have been filed in this case, a number of general obligation bond elections have been held since June 16, 1969, in states which limit the vote in such elections to property taxpayers. Those elections were held in proper reliance upon this Court's express disclaimer that nothing was decided in *Cipriano* dealing with general obligation bonds. For the same reasons underlying the decision to make *Cipriano* prospective only, any extension of *Cipriano* to general obligation bond elections should apply only to general obligation bond elections held after the date of this Court's decision in this case, or in those states whose statutes provide bond election challenge periods, the ruling should apply, as in *Cipriano*, only where the challenge period has not expired.

Cipriano established as the effective date for prospective application of its decision, the date as of which "the time for challenging the election result has not expired . . . ." 395 U.S. at 706. Such a cut-off point was appropriate under the *Cipriano* facts, because Louisana has a statute which specifically provides for chal-

lenge to bond elections and further prohibits any judicial inquiry into the legality of the bonds once the statutory period has elapsed. Louisana Revised Statutes of 1950, Title 33, Section 4260.

Other states, including Arizona, have no parallel provisions. Arizona statutes do provide that election contest suits generally must be brought within five days after completion of the canvass of the election. A.R.S.§§16-1202 and 16-1204. Under the decision of the Arizona Supreme Court in *Morgan v. Board of Supervisors,* 67 Ariz. 133, 192 P.2d 236 (1948), however, there is question whether these statutes operate to preclude bond election challenges brought after expiration of the general five-day statutory election contest period. Therefore, in Arizona, and we suspect in other states, there is no identifiable time as of which the time for challenging the election results has expired.

Accordingly, it is respectfully submitted that in those states which do not have Louisiana-type bond election challenge statutes —with their concomitant provisions that any challenge not brought within the statutory time is forever barred — the Court should not set aside general obligation bond elections which had already been held prior to the decision in the instant case. In *Allen v. State Board of Elections,* 393 U.S. 544 (1969) this Court held that Section 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973 et seq., required that certain changes in state election laws and regulations involved in *Allen* and other companion cases either be submitted to the United States Attorney General for approval, or a declaratory judgment action be brought in the Federal District Court for the District of Columbia. Notwithstanding its holding on the merits, the Court refused to set aside the elections involved. The Court observed as follows:

"Appellants in the Mississippi cases have asked this Court to set aside the elections conducted pursuant to these enactments

and order that new elections be held under the pre-amendment laws. The Solicitor General has also urged us to order new elections if the State does not promptly institute § 5 approval proceedings. We decline to take corrective action of such consequence, however. These § 5 coverage questions involve complex issues of first impression — issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of these statutes, if any, has not been determined by any court. We give only prospective effect to our decision, bearing in mind that our judgment today does not end the matter so far as these States are concerned." 393 U.S. at 571-572.

As in *Allen*, so also in the instant case, general obligation bond authorization elections are "not so clearly subject to" *Cipriano* that the failure to permit non property owners to vote in general obligation bond authorization elections constitutes "deliberate defiance" of the *Cipriano* holding. This is especially true where — as in the instant case — the election was held six days prior to announcement of the *Cipriano* decision. Any application of *Cipriano* to general obligation bond elections should therefore be held prospective only, that is, it should apply only to general obligation bond elections held after the date of the Court's decision in this case, or in those states whose statutes provide identifiable bond election contest challenge periods, the decision should apply only where the statutory time for challenge has not expired. Accordingly, the bonds approved at the June 10, 1969 bond election of the City of Phoenix should be valid.

CONCLUSION

For approximately one hundred years this Court has consistently informed the states that they are free to establish voter qualification requirements for their own citizens, so long as these require-

ments are reasonable. The learning contained in this century of decisions by this Court is sound, and should not be rejected now.

Moreover, whatever the scope of the holding in *Kramer v. Union Free School District*, the rationale of that case makes very clear that its holding has no applicability whatever to general obligation bond elections. *Kramer* by its own terms applies only to elections of people.

It is respectfully submitted that the judgment of the district court should be reversed.

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